

counsel was ineffective and the evidence at trial was insufficient to support his conviction.

Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The facts of this case, as found by our Supreme Court on direct appeal, are:

On August 26, 1998, Floyd McClendon's nude and partially decomposed body was discovered under a pile of branches and debris in the backyard of a vacant house on West 31st Street in Indianapolis. A police investigation eventually led to Dearman who confessed to the killing, but claimed it just happened as he tried to thwart McClendon's sexual advances. In a statement given to police, Dearman said he met McClendon at a liquor store one evening in August 1998. Dearman told police he had been attempting to gather information about some of his relatives with whom he apparently had little contact. McClendon was acquainted with two of Dearman's uncles and offered to share what he knew about them with Dearman. The two rode around in McClendon's car and eventually stopped at the vacant house. As the two sat on the hood of McClendon's car talking, Dearman claimed that McClendon made sexual advances toward him and a scuffle ensued. Dearman said he was trying to get McClendon off him and the next thing he knew McClendon was dead. He immediately fled the scene in McClendon's car. Returning later with a friend, Anthony Goodall, Dearman took money, jewelry, and a credit card from McClendon's body. Dearman sold the jewelry to a local pawnshop and eventually abandoned McClendon's car.

During their investigation, police recovered a thirty-four pound concrete block that Goodall saw Dearman remove from McClendon's car. Dearman told Goodall the block was a "murder weapon." R. at 355. The pathologist testified at trial that the cause of death was blunt force injury to the head. First, there was an impact to the front of McClendon's face, which broke the bones to his eye sockets and fractured his upper jaw. Second, there was an impact to the top of his head, which depressed a fragment of bone down into the skull. This latter injury caved in McClendon's skull and required a great deal of force. According to the pathologist, the injuries were consistent with having been caused by the concrete block that Dearman discarded. In the opinion of the pathologist, if the concrete block was in fact the fatal weapon, then it would have taken two blows to inflict the injuries that McClendon sustained.

Dearman v. State, 743 N.E.2d 757, 759 (Ind. 2001).

On September 8, 1998, the State charged Dearman with murder, felony murder, felony robbery, and auto theft. A two-day jury trial began on June 28, 1999. The jury found Dearman guilty of murder and auto theft, not guilty of felony murder, and was unable to reach a verdict on the robbery charge, which was later dismissed. On June 27, 1999, the trial court sentenced Dearman to sixty-five years for the murder charge and three years for the auto theft charge, with the sentences to run consecutively for an executed term of sixty-eight years. On direct appeal, Dearman argued that the trial court erred when it refused to give his tendered instructions on lesser-included offenses and when it admitted an audiotape of a statement Dearman gave police. Our Supreme Court affirmed Dearman's convictions and sentences on March 9, 2001. Id. at 762.

Dearman filed a petition for post-conviction relief on October 18, 2004, arguing that his trial counsel was ineffective and that there was insufficient evidence at trial to support his conviction. On October 21, 2004, the post-conviction court scheduled an evidentiary hearing for April 6, 2005. The court's policy that a continuance would not be granted if it was requested on the date of the hearing was in bold type on the scheduling order. Tr. 4. At the hearing, Dearman appeared pro se and filed a "motion to defer," but the post-conviction court denied the motion because of its policy. The post-conviction court noted that Dearman had been notified of the hearing date and the court's policy almost six months prior to the hearing. The post-conviction court subsequently asked Dearman to present his case, but Dearman said he was not prepared to proceed. The court asked him, "So you have no

evidence and no argument to present, Mr. Dearman?” Id. at 7. Dearman responded, “No, sir.” Id. The court denied Dearman’s petition for post-conviction relief on April 8, 2005. Appellee’s Br. p. 7-8.¹ Dearman now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Before addressing the merits of Dearman’s contentions, we initially observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. McCarty, 802 N.E.2d at 962. Post-conviction procedures do not afford petitioners the chance for a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, post-conviction procedures create a narrow remedy for subsequent collateral challenges to convictions based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post-Conviction Rule 1(1). We will disturb the post-conviction court’s decision only if the evidence is without conflict, the evidence leads to one conclusion, and the post-conviction court has reached the opposite conclusion. Emerson v. State, 695 N.E.2d 912, 915 (Ind. 1998).

II. Dearman’s Claims

¹ As the State notes, Dearman did not include the post-conviction court’s order in either his brief or his appendices; therefore, the State attached it to its brief as required by Indiana Appellate Rule 46(A)(10).

A. Ineffective Assistance of Trial Counsel

Dearman argues that his trial counsel, Sara Matticks, was ineffective because she failed to instruct the jury on his desired defense, failed to object to allegedly improper remarks made during the State's closing arguments, failed to object to allegedly inconclusive DNA evidence, and failed to make a reasonable investigation into the case. Dearman contends that if his trial counsel had assisted him effectively, he would not have been found guilty of murder and auto theft.

We apply the two-part test articulated in Strickland v. Washington when evaluating a claim of ineffective assistance of counsel. 466 U.S. 668 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 446 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments to the United States Constitution. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. at 687. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Dearman did not present any evidence at the post-conviction hearing. He did not subpoena Matticks to testify and he did not admit the record of the proceedings from his trial.

The post-conviction court, therefore, had no evidence with which to evaluate Dearman's claim of ineffective assistance of counsel. Consequently, Dearman did not meet his burden of showing that Matticks's performance was deficient or that he was prejudiced by the alleged deficient performance. As a result, Dearman's ineffective assistance of trial counsel claim fails.

B. Sufficiency of the Evidence at Trial

Dearman also argues that the post-conviction court erred when it rejected his claim that there was insufficient evidence at trial to support his convictions. However, Dearman has waived review of this claim because he failed to raise it on direct appeal. As noted above, post-conviction procedures do not afford petitioners the chance for a "super appeal." Richardson, 800 N.E.2d at 643. In Woods v. State, our Supreme Court described the post-conviction process as a supplement to the direct appeals process because post-conviction review allows a petitioner to raise issues not known at the time of the original trial and appeal or issues that were not available to him at that time. 701 N.E.2d 1208, 1312 (Ind. 1998). Dearman's claim that the evidence at trial was insufficient to support his conviction was available on direct appeal but he did not raise that claim. See Dearman, 743 N.E.2d at 757. Therefore, this claim is waived for the purposes of post-conviction review.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and CRONE, J., concur.